Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the DC Circuit's ACA International Decision	)	CG Docket No. 18-152

REPLY COMMENTS OF U.S. CHAMBER INSTITUTE FOR LEGAL REFORM AND U.S. CHAMBER TECHNOLOGY ENGAGEMENT CENTER

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I. INTRODUCTION & SUMMARY

The time has come for fundamental clarification of the dysfunctional Telephone Consumer Protection Act ("TCPA") landscape. The TCPA has been broadened in scope and misinterpreted for years, harming consumers and legitimate U.S. businesses. In *ACA International v. FCC*, the D.C. Circuit offered a roadmap toward rational interpretation of the TCPA.[1] Against this backdrop, the Federal Communications Commission ("FCC" or "Commission") has sought input on many TCPA issues, including the U.S. Chamber Coalition Petition[2] for a declaratory ruling on the meaning of "automatic telephone dialing system" ("ATDS" or "autodialer"). The U.S. Chamber Institute for Legal Reform ("ILR") and U.S. Chamber Technology Engagement Center (together, the "Chamber") urge the Commission to how the TCPA is enforced and interpreted.

The record amply supports FCC action to reduce litigation abuse and provide guidance for consumers and businesses. It is clear that confusion about what actions violate the TCPA has fostered abusive litigation that thwarts legitimate business efforts to provide expected and desired communications to consumers. The Commission should quickly act to curb abuse by clarifying the definition of ATDS in line with the stated language in the statute and common sense, as guided by the D.C. Circuit.

The record also supports adopting reasonable proposals to deal with reassigned numbers, including providing safe harbors. Importantly, until the Commission has resolved this issue, there should be a declaration of a moratorium on reassigned numbers litigation. The FCC should also address concerns of businesses and consumer advocates by declaring certain revocation of consent procedures to be *per se* reasonable and allowing contractual agreements to govern

[1] 885 F.3d 687 (D.C. Cir. 2018).
[2] Petition for Declaratory Ruling, U.S. Chamber Coalition (filed May 3, 2018).

revocation of consent. Finally, the FCC should clarify that push notifications are not calls and are thus not subject to the TCPA, as well as allow a safe harbor for inadvertent errors and technical glitches.

II. THE RECORD REVEALS CONFUSION ABOUT WHAT CALLS VIOLATE FEDERAL LAW, FOSTERING A PUNITIVE LITIGATION LANDSCAPE

A. Stakeholders often overlook the distinction between illegal robocalls and legitimate business and informational calls.

The TCPA does not bar all telemarketing calls, nor does it make all calls placed with automated equipment illegal. The TCPA permits automated calls to wireless numbers when the caller has the "prior express consent of the called party."[3] If the automated call contains advertising or constitutes telemarketing, prior express consent must be in writing.[4]

Legitimate business and informational automated calls, whose benefits are highlighted in the record,[5] are entirely distinct from ***illegal robocalls***. Companies and organizations who place legitimate automated calls have every incentive to comply with the TCPA.[6] But as the record makes clear, the legal and reputational damage deterrents that shape legitimate companies'

[3] 47 U.S.C. § 227(b)(1)(A).
[4] 47 C.F.R. § 64.1200(a)(2).
[5] *See, e.g.*, Comments of American Association of Healthcare Administrative Management ("AAHAM"), CG Docket Nos. 02-278 and 18-152, at 6 (filed June 12, 2018) (describing that harmonizing the TCPA and HIPAA will "support the critical public policy goal of providing effective and efficient medical care, especially to at-risk populations"); Comments of Anthem, *et al.* CG Docket Nos. 02-278 and 18-152, at 3, 5 (filed June 10, 2018) (noting that "the threat of abusive class-wide litigation has chilled HIPAA-regulated entities from placing non-marketing calls about treatment, payment, or operations that patients want and expect," including calls and texts that "[e]xplain coverage and how to get needed care; [and] [p]erform health screenings and identify at-risk members."); Comments of Blackboard, Inc., CG Docket Nos. 02-278 and 18-152, at 2 (filed June 13, 2018) (stating that the vacated one-call safe harbor rule "had a chilling effect on the ability of schools and other educational institutions to send important and essential education-related information[.]").
[6] *See* Testimony of Scott Delacourt before the Senate Comm. on Commerce, Science & Transportation, 115th Cong. (Apr. 18, 2018) ("[B]usinesses fear the brand and customer relationship damage of being cast as an illegal and abusive robocaller").

behaviors do not have the same effect on illegal robocallers, or bad actors—who often operate overseas or are judgment proof—who call with the intent to harm consumers. As explained in comments submitted by the Professional Association for Customer Engagement:

> [B]ad actors are not concerned about TCPA liability because they use technology to hide from law enforcement and plaintiffs' attorneys. Individuals originating calls with the intent to defraud (as defined in the Truth in Caller ID Act) are often located in foreign countries and use voice over internet protocol (VoIP) technology to place high volumes of calls that "spoof" a telephone number or calling party name to trick consumers. VoIP technology makes tracing the call originator difficult, allowing unscrupulous actors to evade authorities. Spoofing is also used by unscrupulous telemarketers to hide their true identity as they avoid complying with state and federal do-not-call lists and registration requirements.[7]

Many stakeholders conflate legitimate automated calling with illegal robocalls made by "over-the-phone scam artists" and "foreign fraudsters."[8] Consumer Action, for example, urges the Commission to avoid "unleashing millions more" robocalls from "scammers and predatory debt collectors," claiming that maintaining the dysfunctional status quo is necessary to avoid creating loopholes that could "mean the difference between a few harassing phone calls or hundreds a week for a single cell phone owner."[9] This argument assumes that illegal robocallers' behaviors are affected by the FCC's interpretation of the TCPA, but that assumption is misguided. Rationalizing the definition of ATDS or otherwise re-interpreting the TCPA to have a more reasonable scope will not impact the volume of illegal robocalls; it will, however, facilitate expected and desired legitimate calls and curtail litigation abuse. Consumer groups do not appreciate that the current interpretation of the statute chills many legitimate calls that

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[7] *See* Comments of Professional Association for Customer Engagement ("PACE"), CG Docket Nos. 02-278 and 18-152, at 3 (filed June 13, 2018) (internal footnotes omitted).
[8] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Dissenting Statement of Commissioner Ajit Pai, 30 FCC Rcd. 7961, at 1 (July 10, 2015) ("Pai Dissent").
[9] Comments of Consumer Action, CG Docket Nos. 02-278 and 18-152, at 1-2 (filed June 11, 2018).

consumers expect and desire. Not all calls made with ATDS technology are from "scammers and predatory debt collectors,"[10] and those that are made by bad actors are usually made with blatant disregard for the Commission's rules and interpretations.

FCC and FTC statistics and statements sometimes also elide important distinctions between legitimate automated calls and illegal robocalls by bad actors. In the *2015 Omnibus Order*, the FCC relied on statistics about consumer complaints that made no distinction between these two types of automated calls.[11] The FTC recently stated incorrectly in a press release that "[v]irtually all telemarketing robocalls to consumers are illegal under the [Telemarketing Sales Rule]."[12]

Inaccurate reporting and data contribute to the consumer frustration behind many complaints. Imprecision also leads to bad policy. For the FCC to develop an effective solution, it must accurately frame the problem. If the problem the Commission is looking to solve is illegal robocalling, then broadly interpreting the TCPA—which Congress intended to be a scalpel, not a pickaxe—is not the way to do it.

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[10] *Id.* at 1.

[11] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd. 7961 ¶ 5 (July 10, 2015) ("*2015 Omnibus Order*") (identifying increases in FCC and FTC consumer TCPA complaints and illegal robocall complaints, respectively, without any analysis of whether consumer consent was obtained or a consent exception applied); *see also* 2016-2017 FTC Biennial Rep. to Congress Under the Do Not Call Registry Fee Extension Act of 2007 at 4-5 (indicating that the FTC complaint intake process enables a consumer to identify the subject matter of a self-identified illegal robocall without explaining how the consumer knows the call is, in fact, illegal).

[12] *See FTC Sues to Stop Two Operations Responsible for Making Billions of Illegal Robocalls*, FTC Press Release (June 5, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/ftc-sues-stop-two-operations-responsible-making-billions-illegal.

B. The record confirms that companies are operating under a class action regime that benefits lawyers and fails consumers.

As noted in the U.S. Chamber Coalition Petition, the combination of the unduly expansive interpretation and implementation of the TCPA with uncapped statutory damages has resulted in the TCPA becoming the "poster child for lawsuit abuse."[13] In 2007, there were only 14 TCPA litigants, but by 2016, that number had exploded to 4,860 litigants.[14] From 2015 to 2016 alone, TCPA litigation grew by 31.8%.[15] ILR's study shows that the *2015 Omnibus Order* contributed to a 46% increase in TCPA litigation in the 17-month period following its issuance.[16]

Other commenters have shown how out-of-control the TCPA landscape has become. For example, the record reflects a 585% increase in TCPA litigation from 2011-2016 alone, noting that "legitimate businesses must incur substantial expenses defending specious lawsuits or avoid TCPA risk by limiting the ways they interact with consumers thereby depriving such consumers of beneficial communications."[17]

Large and small businesses throughout the country have been subject to burdensome TCPA litigation, despite their good faith compliance efforts. Edison Electric Institute describes a case in which the new subscriber of a phone number previously assigned to a co-op member sued an electric cooperative.[18] The plaintiff alleged that the co-op continued to send low-balance

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[13] Pai Dissent; *see also* Testimony of Scott Delacourt before the Senate Comm. on Commerce, Science & Transportation, 115th Cong. (Apr. 18, 2018).
[14] *See 2016 Year in Review: FDCPA Down, FCRA & TCPA Up*, WebRecon LLC, https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/ ("2016 Year in Review").
[15] *See id.*
[16] See *TCPA Litigation Sprawl*, U.S. Chamber Institute for Legal Reform at 2, http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf; *see also* Testimony of Scott Delacourt before the Senate Comm. on Commerce, Science & Transportation, 115th Cong. (Apr. 18, 2018).
[17] Comments of PACE at 4 (internal footnotes omitted).
[18] Comments of Edison Electric Institute and National Rural Electric Cooperative Association, CG Docket Nos. 02-278 and 18-152 (filed June 13, 2018).

notifications to the new subscriber after the number was reassigned. Rather than opt out, the new subscriber continued to receive phone calls and waited 13 months to initiate a lawsuit claiming TCPA harms, gaming the damages calculation.[19] The record also describes the chilling effect of the overly expansive TCPA interpretation: "Instead of protecting consumers from undesirable practices by unscrupulous actors, the TCPA chills important communications from legitimate businesses—*e.g.*, order confirmations, appointment reminders, shipping and delivery notifications, product and services notifications, prescription refill reminders, fraud alerts, satisfaction surveys, and loyalty program alerts—that are initiated via modern technology."[20]

Overly expansive interpretations of the TCPA have warped its original purpose of stopping abusive unsolicited telemarketing and have imposed severe litigation risks on legitimate companies seeking to communicate with their customers.

III. THE RECORD SUPPORTS EXPEDITIOUSLY GRANTING THE U.S. CHAMBER COALITION PETITION TO CLARIFY THE DEFINITION OF ATDS

A wide swath of commenters urges the FCC to interpret "ATDS" in line with the statute and common sense, as guided by the D.C. Circuit. The U.S. Chamber Coalition Petition urges the Commission to resolve the legal uncertainty surrounding the definition of ATDS and bring common sense to the statute by adopting a construction of what constitutes an ATDS that conforms to the statutory language and congressional intent.

First, the Commission should confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention. ***Second,*** the Commission should find that only calls made using actual

[19] *Id.* at 4, n. 8.
[20] Comments of Retail Industry Leaders Association, CG Docket Nos. 02-278 and 18-152, at 2 (filed June 13, 2018) (internal footnotes omitted).

ATDS capabilities are subject to the TCPA's restrictions. The mass of commenters support this approach.[21] If the Commission goes this route (as suggested by both Commissioner O'Rielly and the D.C. Circuit), it need not grapple with semantics over present or future "capacity" as urged by some. If it feels obliged to address this term, "present capacity" is the most sensible approach, as suggested by most commenters.[22]

While some commenters urge the FCC to interpret ATDS broadly, their proposals amount to bad policy that is incompatible with the goals and terms of the TCPA. Their proposals focus on technology regardless of how it is used,[23] and are also contrary to the goals of the TCPA, which was never intended to discourage all calling technology. These approaches also impermissibly ignore the statute's text.[24]

The Commission should act ***immediately*** to resolve the ATDS issue and not combine this relief with other TCPA-related issues. As the Chamber explained, divergent caselaw is

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[21] *See, e.g.*, Comments of Cisco, Coalition of Higher Education Assistance Organizations, Edison Electric Institute and National Rural Electric Cooperative Association, Electronic Transactions Association, Heartland Credit Union Association, Independent Community Bankers of America INCOMPAS, International Pharmaceutical & Medical Device Privacy Consortium, National Opinion Research Center, NCTA – The Internet & Television Association, PRA Group, Inc., PACE, Quicken, Restaurant Law Center, Retail Energy Supply Association, RILA, Sirius XM Radio, Inc., and United Health Group.

[22] *See, e.g.*, Comments of ACA International, CG Docket Nos. 02-278 and 18-152, at 6 (filed June 13, 2018); Comments of American Financial Services Association, CG Docket Nos. 02-278 and 18-152, at 4 (filed June 13, 2018); Comments of AmeriCollect, Inc., CG Docket No. 18-152 (filed June 8, 2018); Comments of Bellco Credit Union, CG Docket No. 18-152, at 1 (filed June 12, 2018).

[23] *See, e.g.*, Comments of Burke Law Offices, CG Docket No. 02-278, (filed June 13, 2018); Comments of Consumer Action at 2; Comments of National Consumer Law Center, CG Docket Nos. 02-278 and 18-152 at 3 (filed June 13, 2018); *cf.* Comments of Jim Hood, Attorney General, State of Mississippi, CG Docket Nos. 02-278 and 18-152, at 2 (filed June 12, 2018) (arguing that the Commission should regulate callers' capacity to call millions of consumers in a minute no matter the technology used).

[24] 47 U.S.C. § 227(a) (defining ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers").

developing, causing increased uncertainty. In the brief time since the U.S. Chamber Coalition Petition was filed at the beginning of May, at least two different federal courts have come to different conclusions about how the D.C. Circuit's decision impacts whether a predictive dialer falls into the category of an ATDS.[25] The FCC should act without delay to clarify the definition of an autodialer, as outlined in the U.S. Chamber Coalition Petition, and in doing so, reject the 2003 and 2008 interpretations of an autodialer that sweep in all predictive dialers regardless of their actual capabilities. This action will help to reduce the continued stream of litigation and conflicting case law that defines the out-of-control TCPA landscape. Even beyond this issue of whether a predictive dialer is an ATDS, the Commission should not delay in bringing clarity to this threshold term in the TCPA.

IV. THE RECORD DEMONSTRATES BROAD SUPPORT FOR REASONABLE PROPOSALS ABOUT REASSIGNED NUMBERS, INCLUDING SAFE HARBORS

A. Liability for misdirected calls to reassigned numbers can expose companies to unfair "gotcha" litigation.

Misdirected calls to reassigned numbers are an annoyance to consumers and ineffective for companies, but the FCC's approach to these calls must not encourage serial plaintiffs or others looking to profit by sitting idly by, gaming the statutory damage calculation, unbeknownst to the caller. Companies can make honest mistakes and may have no way of knowing that after obtaining consent, a customer-provided number has later been reassigned.

A case that the FCC considered under its *2015 Omnibus Order* highlights the problem:

> Rubio's, a West Coast restaurateur . . . sends its quality-assurance team text messages about food safety issues, such as possible foodborne illnesses, to better ensure the health and safety of Rubio's customers. When one Rubio's employee

[25] *Compare Reyes v. BCA Financial Services, Inc.*, 2018 WL 2220417 (S.D. Fla. May 14, 2018) (finding that the D.C. Circuit's decision did not affect the FCC's 2003 and 2008 predictive dialer decisions), with *Herrick v. GoDaddy.com, LLC*, 2018 WL 2229131 (D. Ariz. May 14, 2018) (finding that the D.C. Circuit invalidated the earlier predictive dialer decisions).

> lost his phone, his wireless carrier reassigned his number to someone else. Unaware of the reassignment, Rubio's kept sending texts to what it thought was an employee's phone number. The new subscriber never asked Rubio's to stop texting him—at least not until he sued Rubio's in court for nearly half a million dollars.[26]

In another case, a serial TCPA plaintiff[27] bought prepaid cell phones and, despite residing in Pennsylvania, selected Florida zip codes because she knew these were areas where "people would be usually defaulting on their loans or their credit cards."[28] The plaintiff purchased *at least thirty-five cell phones* and "waited for them to ring;" she "intended for the calls to continue because she "'was hopefully going to ask [her] lawyers to do trebling with knowing and willful'" violations of the TCPA if they did."[29] She brought suit against a company who called two of its former customers whose numbers had been reassigned to two of her many cell phones.[30] The court in this case rightfully found that the plaintiff lacked standing to sue under the TCPA.[31]

The FCC should clarify its approach to reassigned numbers to eliminate the potential for these abusive litigation tactics. Serial plaintiffs[32] and others looking to profit should not be allowed to make these types of unfair claims.

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[26] Pai Dissent at 9.
[27] At the time of the *Stoops v. Wells Fargo*, "[Stoops] ha[d] filed at least eleven TCPA cases in [the Western District of Pennsylvania][.]" 197 F. Supp. 3d 782, 788 (W.D. Pa. 2016).
[28] *Id.* (internal quotations omitted).
[29] *Id.*
[30] *Id.*
[31] *Id.* at 806.
[32] *See* Letter from ACA International et al to the Members of the U.S. House of Representatives, (Mar. 8, 2017), http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Coalition_Letter_FICALA_to_House.pdf. For example, Craig Cunningham of Nashville, according to news reports, has filed approximately 83 TCPA lawsuits since 2014—including 19 in 2017. He has three cell phones he uses to compile TCPA claims. John O'Brien, *Phony Lawsuits: Man Has Filed 80 Lawsuits And Uses Sleuthing Skills To Track Down Defendants*, Forbes, Nov. 1, 2017, https://www.forbes.com/sites/legalnewsline/2017/11/01/phoney-lawsuits-man-has-filed-80-lawsuits-and-uses-sleuthing-skills-to-track-down-defendants/#456cd2a76be7; A U.S. Magistrate Judge found Jan Konopca, a serial plaintiff who has filed 31 lawsuits in New Jersey federal court,

B. The record supports reasonable reliance on consent and safe harbor protection for companies calling reassigned numbers.

Commenters agree that a company that reasonably relies on the accuracy of customer-provided numbers should not be subject to TCPA liability for claims that a call was placed by an ATDS to a number without the required prior consent.[33] As Blackboard Inc. stated in its comments, "The reassignment of a wireless number should not automatically extinguish the consent given by the number's previous holder and expose the caller to TCPA liability."[34] So long as the business legitimately believes that a customer-provided number still belongs to its customer, and that customer was the intended recipient of a call, the new owner of the reassigned number should not have standing as a "called party."[35]

In addition, the FCC should adopt a safe harbor to protect companies that use commercial solutions to avoid calling reassigned numbers from TCPA liability.[36] Databases and other tools

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was actively seeking the calls. Mr. Konopca earned approximately $800,000 for his endeavors and has even claimed that he is no longer eligible for Social Security Disability benefits because of his TCPA litigation. John O'Brien, *Phony Lawsuits: Comcast Fighting For Access to 'Professional' Plaintiff's Prior Testimony*, Forbes, May 31, 2017, https://www.forbes.com/sites/legalnewsline/2017/05/31/phoney-lawsuits-comcast-fighting-for-access-to-professional-plaintiffs-prior-testimony/#18a02fba727c; *see also* John O'Brien, *Phony Lawsuits: How a Polish immigrant apparently sued his way to $800K*, Forbes, Mar. 15, 2017, https://legalnewsline.com/stories/511092959-phoney-lawsuits-how-a-polish-immigrant-apparently-sued-his-way-to-800k.

[33] *See, e.g.,* Comments of ADT LLC d/b/a ADT Security Services, CG Docket Nos. 02-278 and 18-152 (filed June 13, 2018) (reliance on prior consent is reasonable as long as the caller does not have actual knowledge that it is calling a reassigned or wrong number); Comments of American Financial Services Association (the Commission should confirm that callers may reasonably rely on the prior express consent provided by the intended recipient until they learn about a reassignment).

[34] Comments of Blackboard, Inc. at 4.

[35] There is ample support for this position in the record. *See, e.g.,* Comments of National Association of Federally-Insured Credit Unions, CG Docket Nos. 02-278 and 18-152 at 1 (filed June 13, 2018); Comments of ACA International at 8; Coalition of Higher Education Assistance Organizations at 4.

[36] *See, e.g.,* Comments of AAHAM at 4-5.

help callers verify subscribers and are currently commercially available.[37] Companies that leverage these available tools should receive safe harbor liability protection.

A safe harbor should also apply if the FCC adopts a reassigned numbers database. The safe harbor should shield a company from TCPA liability for making a call to a reassigned number if the company (1) accesses and scrubs against a database in a reasonable timeframe (*e.g.*, every 30 days), and (2) has policies and procedures (such as training) to ensure that customer records are updated to reflect phone number reassignments. While the Commission is formulating, constructing, and approving a database option or other tool, the safe harbor for companies that utilize commercially available tools should apply. As the Chamber and others have explained, the FCC has authority to create safe harbors and should use that authority here.[38] Any safe harbor addressing reassigned numbers should echo the TCPA's safe harbor that applies to the Do-Not-Call ("DNC") database.[39]

Additionally, because of the uncertainties created by the status quo, which perpetuate unnecessary and unfair litigation risk for companies that accidentally call reassigned numbers, a moratorium on litigation over calls to reassigned numbers is appropriate. As the Chamber urged in its comments, the FCC should immediately call on judges to hold in abeyance any such litigation until the FCC establishes a reasonable framework.

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[37] *See* TCPA Compliance, Neustar Risk, https://www/risk.neustar/complaince-solutions/tcpa.

[38] *See, e.g.*, Comments of Edison Electric Institute and National Rural Electric Cooperative Association at 11-12; *see also* Comments of Independent Community Bankers of America, CG Docket Nos. 02-278 and 18-152, at 5 (filed June 13, 2018). Indeed, even consumer groups appear to believe that the Commission has the authority to create a safe harbor, albeit the safe harbor they propose is narrower in scope than the one the Chamber is proposing. *See* Comments of Consumer Union, CG Docket Nos. 02-278 and 18-152, at 3 (filed June 13, 2018); *see also* Comments of National Consumer Law Center at 29.

[39] *See, e.g.*, Comments of A to Z Communications Coalition and The Insights Association, CG Docket Nos. 02-278 and 18-152, at 13-14 (filed June 7, 2018).

A few comments opportunistically oppose protecting callers from liability for calls to reassigned numbers, claiming that "***any*** interpretation … that provides a safe harbor for calls to reassigned numbers would directly contradict the intent of Congress, and be arbitrary and capricious."[40] This claim, offered by a law firm that profits from precisely this sort of litigation, is nonsense.[41] Contrary to its claim, it is untenable and contrary to Congress's goals to perpetuate a system in which any error, however innocent or slight (such as one errant call to a number for which a caller reasonably believes it has consent) subjects a company to liability. The D.C. Circuit's decision conveys the court's discomfort with such a trap.[42]

V. THERE IS OVERWHELMING SUPPORT FOR THE FCC TO CLARIFY OPT-OUT MECHANISMS

A. The FCC should recognize a set of free, ubiquitous, and easy-to-use opt-out tools for consumers to revoke consent to receiving calls, and state that offering two such tools is *per se* reasonable.

Many commenters urge the FCC to approve methods of revoking consent that are presumptively reasonable.[43] Consumer advocates acknowledge the utility of the FCC simplifying

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[40] Comments of Burke Law Offices at 6 (emphasis in original).
[41] *See* https://www.burkelawllc.com/; *see also* Hannah Meisel, *Ocwen TCPA Deal Delayed As Judge Mulls Atty Sanctions*, Law360 (Apr. 17, 2018 10:33 PM), https://www.law360.com/articles/1034482?scroll=1
[42] *ACA Int'l*, 885 F.3d at 708 ("[T]he Commission's one-call-only approach cannot be salvaged by its suggestion that callers rather than new subscribers should bear the risk when calls are made (or messages are sent) to a reassigned number. That consideration would equally support a zero-call, strict-liability rule. But the Commission specifically declined to adopt 'a result that severe.' Having instead embraced an interpretation of the statutory phrase 'prior express consent' grounded in conceptions of reasonable reliance, the Commission needed to give some reasoned (and reasonable) explanation of why its safe harbor stopped at the seemingly arbitrary point of a single call or message. The Commission did not do so.") (internal citations omitted).
[43] *See, e.g.*, Comments of ACA International at 10; Comments of ACT – The App Association, CG Docket Nos. 02-278 and 18-152, at 5 (filed June 15, 2018); *see also* Comments of Credit Union National Association, CG Docket Nos. 02-278 and 18-152, at 7-10 (filed June 13, 2018); and Comments of CTIA, CG Docket Nos. 02-278 and 18-152, at 6-8 (filed June 13, 2018).

the revocation landscape, and creating standard methods by which consumers can easily revoke consent.[44]

To meet the goals of both industry and consumer advocates, the Commission should recognize a set of tools that are *per se* reasonable for revocation of consent. All such tools should meet three broad characteristics to ensure that they impose no undue burden on consumers—they should be free, ubiquitous, and easy-to-use.

Commenters agree that several currently available tools meet these three characteristics.[45] As the Chamber suggested in its comments, the Commission should declare that the following tools are *per se* reasonable: texting STOP to STOP; calling or texting 1-800 numbers and other toll free numbers; e-mailing a designated email address; and mailing a specified address. The Commission should consider the other tools suggested that may meet the above criteria, including company websites or other webpages that provide an opt-out tool, and automated, key-pad opt-outs like those already required by the TCPA in certain circumstances.[46] The list of tools

[44] *See, e.g.*, Comments of Consumer Action at 2 (urging the FCC to create standard methods by which consumers can easily revoke consent); Comments of Consumers Union at 2 (urging the FCC to establish nonexclusive methods that consumers may use to revoke consent at any time); Comments of the Electronic Privacy Information Center ("EPIC"), CG Docket Nos. 02-278 and 18-152, at 7 (filed June 13, 2018) (suggesting that the FCC require callers to provide a simple means of revocation such as pushing a button); Comments of Jim Hood, Attorney General, State of Mississippi at 2 (supporting the goal of making revocation of consent as easy as possible). These comments highlight the consumer benefits of simplicity and commonality.

[45] *See, e.g.*, Comments of PACE at 13-14 (stating that callers should receive protection against unreasonable revocations when using certain tools, including a designated opt-out phone number or email, industry best practice keywords, verbal opt-out in live calls, and automated, key-press opt-outs); Comments of INCOMPAS, CG Docket Nos. 02-278 and 18-152, at 8 (filed June 13, 2018) ("Companies can provide procedures for opting-out on their company websites and can provide the designated address, email address, or webpage where consumers can submit a revocation request. INCOMPAS also agrees that either a standardized code or response, such as 'STOP,' to an SMS would meet these criteria.").

[46] Comments of PACE at 13-14 (stating that callers should receive protection against "unreasonable" revocations when using certain tools, including automated, key-press opt-outs); Comments of INCOMPAS at 8 ("Companies can provide procedures for opting-out on their

that are *per se* reasonable should be purely voluntary, non-exhaustive, and illustrative. Use of these techniques should never be required as prescriptive, specific regulation is ill-advised. Offering two such tools should be declared reasonable.[47]

Additionally, there is support for the Chamber's proposal for the Commission to establish a presumption regarding reasonableness, whereby consumers who do not use a *per se* reasonable tool—if two or more are made available—are deemed to have revoked in an unreasonable way.[48]

B. Consumers and companies should be able to contractually agree to a means of revocation.

The D.C. Circuit made clear that the *2015 Omnibus Order* "did not address whether contracting parties can select a particular revocation procedure by mutual agreement."[49] It described that while "[t]he ruling precludes unilateral imposition of revocation rules by callers; it does not address revocation rules mutually adopted by contracting parties. Nothing in the Commission's order thus should be understood to speak to parties' ability to agree upon revocation procedures."[50]

The record shows support for the FCC to clarify that parties are free to contract to mutually agreed upon revocation procedures. For example, ADT LLC asks the FCC to confirm that a consumer may not unilaterally revoke consent that was part of a bargained-for exchange,

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company websites and can provide the designated address, email address, or webpage where consumers can submit a revocation request.")

[47] The International Pharmaceutical and Medical Device Privacy Consortium agrees with this approach. Comments of International Pharmaceutical and Medical Device Privacy Consortium, CG Docket Nos. 02-278 and 18-152, at 9 (filed June 13, 2018) (urging that a safe harbor could be contingent on a caller's provision of at least two FCC approved opt-out methods); *cf.* Comments of Bellco Credit Union at 2-3 (proposing that a caller be protected from litigation if it offers at least three reasonable withdrawal of consent options to the called party).

[48] *See, e.g.,* Comments of ACT – The App Association at 5 ("The App Association believes permitted opt-out methods should be (1) clear and conspicuous and (2) able to be requested by a consumer with minimal effort; and that other opt-out methods should be *per se* unreasonable.").

[49] *ACA Int'l*, 885 F.3d at 710.

[50] *Id.*

while the American Association of Healthcare Administrative Management urges the FCC to adopt the Second Circuit's articulation, which confirmed that parties may agree to specific consent revocation methods, including through the terms and conditions of a bilateral consumer contract.[51]

Some commenters oppose allowing contractual agreements to dictate the means of revocation,[52] but there is no rationale or evidence of harm that would justify the FCC limiting such contractual arrangements. Doing so would unreasonably and unlawfully extend FCC superintendence over private contracts.[53]

VI. THE RECORD CONTAINS ADDITIONAL PROPOSALS THAT THE COMMISSION SHOULD CONSIDER TO FURTHER RATIONALIZE THE TCPA LANDSCAPE AND FACILITATE DESIRED MODERN COMMUNICATIONS

A. The FCC should clarify that push notifications are not calls under the TCPA.

The Commission should clarify that intra-app communications (*i.e.,* "push notifications") are not calls and are not subject to the TCPA. As ACT – The App Association explains in its comments, push notifications are IP-based and, unlike text messages, do not rely on mobile numbers or cellular networks.[54] Unlike texts, consumers also have "greater control over the push

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[51] Comments of ADT LLC, at 14 ("[T]he Commission also should follow … *Reyes* … and conclude that a consumer may not unilaterally revoke consent 'when that consent is given, not gratuitously, but as bargained-for consideration in a bilateral contract.' Holding consumers to their bargained for exchanges would substantially reduce abusive litigation and bring further certainty to the marketplace."); Comments of AAHAM at 5; *see also* Comments of Retail Industry Leaders Association at 25-27.

[52] *See, e.g.,* Comments of Consumer Action at 2 (The Commission should "[e]nsure that consumers always can revoke permission to receive robocalls to their cell phones, even when consent was contractually required and enlisted during onboarding of new cell phone service….").

[53] The Commission has long recognized that "public policy requires minimal regulatory interference with private contracts entered into by consenting parties." *Echostar v. Fox et al.*, Order on Reconsideration, 14 FCC Rcd. 10480, 10485 (June 30, 1999).

[54] Comments of ACT – The App Association at 3.

notifications they receive."[55] The Chamber respectfully requests that the Commission decisively resolve ongoing ambiguity about the issue and ensure that innovative app services continue to be available to consumers by affirming that the TCPA does not govern push notifications.

B. The FCC should create a safe harbor for inadvertent errors and technical glitches.

In October 2017, ContextMedia d/b/a Outcome Health filed a Petition for Clarification or Declaratory Ruling, seeking, *inter alia*, a finding that TCPA liability does not attach to certain technical errors.[56] The Chamber filed comments in support of this safe harbor relief for inadvertent errors or technical glitches.[57] On June 18, 2018—following the deadline for the opening round of comments in the current proceeding—Outcome Health withdrew its petition because the underlying class action litigation settled.[58]

The Chamber respectfully requests that the Commission consider the comments filed in response to the Outcome Health Petition relating to the request for an inadvertent error/technical glitch safe harbor. This type of safe harbor—like the safe harbor proposed for reassigned numbers—will provide certainty and protection to well-meaning businesses, and it will encourage robust compliance efforts and overall positive behavior. The record is clear that the TCPA should not be a strict liability statute.[59] Technical glitches and inadvertent errors, as well as unknowing calls to reassigned numbers, should not result in automatic liability for well-meaning companies acting reasonably.

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[55] *Id*.
[56] *See* Petition of ContextMedia, Inc. d/b/a Outcome Health for Clarification, or, in the Alternative, for Declaratory Ruling, CG Docket No. 02-278 (filed Oct. 20, 2017).
[57] *See* Comments of U.S. Chamber of Commerce, CG Docket No. 02-278 (filed Dec. 12, 2017).
[58] Motion to Withdraw Petition for Clarification or Declaratory Ruling of ContextMedia, Inc. d/b/a Outcome Health, CG Docket No. 02-228 (filed June 18, 2018).
[59] *See, e.g.,* Comments of CTIA at 6 ("A strict liability framework . . . would continue to impede legitimate communications from callers that consumers want and expect. It would also be inconsistent with the *ACA* decision . . . .").

VII. CONCLUSION

As set forth above and in the Chamber's initial comments, the D.C. Circuit's decision invalidating the worst portions of the *2015 Omnibus Order* provides a catalyst and roadmap for the Commission to rationalize the TCPA. The Commission should take the following steps:

- Expeditiously grant the U.S. Chamber Coalition Petition to interpret "ATDS" in line with the statute and common sense.
- Adopt a safe harbor from liability for calls to reassigned numbers for companies that use commercially available tools or an FCC reassigned numbers database, if adopted, to avoid calls to such numbers. Call for a moratorium on reassigned numbers litigation until the issue is clarified by the Commission.
- Approve a set of presumptively reasonable options for revoking consent and clarify that consumers and companies can contractually agree on revocation procedures.
- Confirm that the TCPA does not govern push notifications.
- Create a safe harbor for inadvertent errors and technical glitches.

The FCC should seize the opportunity to take the practical steps identified above and in the Chamber's initial comments to begin to rein in the sprawling reach of the TCPA and curb rampant abusive litigation under the statute. This course of action is consistent with the text and purpose of the TCPA, and the D.C. Circuit's guidance.

Respectfully Submitted,

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